

8748 *Gen. Govt.*
R. Cambasos
GAO 00044

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193572

DATE: JAN 3 1979

MATTER OF: [Construction of the John F. Kennedy Library]

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DIGEST:

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The Commonwealth of Massachusetts donated land and proposed to make a conditional gift of \$2 million to the United States for construction of improvements to the site of the John F. Kennedy Library (Library) and approaches thereto. The Congress accepted the gift with the understanding that the construction work would be performed by a private corporation, the John F. Kennedy Library, Inc., (Corporation). Later, because of an accelerated need for funds during construction of the Library by the Corporation, it appropriated \$2 million to be applied for the same purposes as the conditional gift in advance of receipt of the gift. We would not object to GSA's proposal to transfer all or a major portion of the \$2 million to the Corporation to pay for construction costs to avoid contracting interface problems should GSA attempt to deal directly with the Corporation's contractor or some other firm.

This decision is in response to a request from the Administrator of General Services for an advance decision as to the manner in which the \$2 million provided by the Treasury, Postal Service and General Government Appropriations Act, 1979, Pub. L. No. 95-429, October 10, 1978, 92 Stat. 1001, for site improvements and approaches to the John F. Kennedy Library (Library) is to be expended. The Administrator asks whether the funds must be expended by the General Services Administration (GSA) directly or whether the funds may be transferred to the John Fitzgerald Kennedy Library, Inc., (Corporation), for expenditure by it. For the reasons stated below, the latter alternative is acceptable.

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We have set forth in some detail the events giving rise to this inquiry in order to clarify this rather novel issue. On February 25, 1965, the widow and executors and trustees under the estate of President John F. Kennedy offered and the Administrator of General Services accepted "for purposes of ultimate deposit in the Kennedy Library" the papers, documents, mementos and other memorabilia,

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formerly belonging to and related to the life and work of the late President. Subsequently, on May 31, 1966, the Corporation offered to the Administrator the prospective donation of a facility to house the Library to be erected on ten acres of land located in Cambridge, Massachusetts, near Harvard University. Before final acceptance of the proposal, the Administrator, as required by 44 U.S.C. § 2108(a), transmitted the proposal and his tentative acceptance thereof to the Congress, so that it might within 60 days of continuous session, have the opportunity to review and reject the prospective acceptance by contrary legislation. Instead, H. J. Res. No. 1207, 89th Cong., 2d Sess., was proposed and enacted (Pub. L. No. 89-547, August 27, 1966, 80 Stat. 370) waiving the 60-day waiting period. (For a more detailed explanation see the reports of the Senate Government Operations Committee accompanying H. J. Res. 1207, S. Rep. No. 1456, 89th Cong., 2d Sess., pp. 2-6 (1966) and the House Committee on Government Operations, H. R. Rep. No. 1801, 89th Cong., 2d Sess., pp. 2-6 (1966).) Thereafter, the ten acre site, which was donated by the Commonwealth for use as the Library site, was conveyed to the United States.

Ten years later, however, Pub. L. No. 94-300, May 29, 1976, 90 Stat. 589, was enacted, directing the Administrator to reconvey the Cambridge site to the Commonwealth without consideration. The reason for this action was that the Corporation had encountered opposition from environmentalists and local citizen groups to construction of the Library at the Cambridge site. The Corporation then determined in February 1975, that it had become impracticable to construct the Library in Cambridge, and recommended on November 24, 1975, that the most suitable alternative plan would be to construct the Library on land at the campus of the University of Massachusetts known as Columbia Point, adjacent to Dorchester Bay in Boston. See report of the Senate Government Operations Committee accompanying S. 3399, S. Rep. No. 94-840, pp. 1 & 2 (1976).

Thereafter, the Massachusetts legislature adopted an act (chapter 298 of the 1976 Massachusetts session laws, August 19, 1976) which, inter alia: directed the donation of the Columbia Point land to the United States as a site for the Library; authorized a sale of part of the former site (designated as parcel 1B) upon its reconveyance to the Commonwealth; and, provided in pertinent part that:

"The entire proceeds to the commonwealth from the sale or other disposition of parcel 1B in accordance with this session shall be credited to the JFK Fund. Said proceeds shall be used, subject to appropriation, as follows:

the first two million dollars shall be donated by the commonwealth, acting by and through the commissioner of administration, to the United States of America, acting by and through the Administrator of General Services, to finance improvements on the site for the library and approaches thereto; * * *" (ch. 298, sec. 6)

On September 8, 1976, the Governor of the Commonwealth offered through the Administrator of General Services to donate the Columbia Point site to the United States. On March 16, 1977, the Corporation formally offered at its expense to design and construct a building on the site, and to donate the building to the United States upon its completion.

Since the new offer contemplated construction at a site different from the one specified in Pub. L. No. 89-547, the Administrator, as required by 44 U.S.C. § 2108(a), submitted a new report to the Congress on the proposed Library on April 1, 1977.

Thereafter, Pub. L. No. 95-34, May 26, 1977, 91 Stat. 174, was enacted, authorizing the Administrator of General Services to accept the donation and waiving the 60-day waiting period before acceptance.

On July 6, 1977, the Corporation awarded a contract for the construction of the Library to the Turner Construction Company. Construction is estimated to be completed by September 1979.

Dup Thereafter the Treasury, Postal Service and General Government Appropriations Act, 1979, Pub. L. No. 95-429 October 10, 1978, 92 Stat. 1001, was enacted containing the following language under the heading "Federal Buildings Fund Limitations on Availability of Revenue":

"That \$2,000,000 [to be received] by the United States as a gift from the Commonwealth of Massachusetts pursuant to Chapter 298 of the 1976 Acts of the legislature of the Commonwealth [see supra] shall accrue to the fund, and not to exceed \$2,000,000 authorized herein for alterations and major repairs of public buildings shall be available in advance of receipt of said gift to be applied for the purpose of the gift."

However, nothing in the 1979 Treasury Appropriations Act states who is to control the expenditure of the funds. The provision was added by the House Appropriations Committee, with no explanation

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being provided in its report on the bill, nor are there relevant statements in the Senate report or in the Committee hearings.

The position of the Administrator of General Services on this matter is set forth in his inquiry as follows:

"We have been advised by the Corporation that because of increases in construction costs as a result of inflation, a portion of the \$2 million authorized to be advanced from the Federal Buildings Fund is needed to cover a portion of construction work already performed and certain work not performed but contracted for. In addition, GSA presently plans to apply part of the funds for construction work not included in the original design, but desirable for the efficient operation of the library.

"Manifestly, GSA has discretion in the manner in which the funds will be used, provided that the use is consistent with the purposes stated in the Massachusetts Act authorizing the donation (i.e., for site improvements and approaches thereto).

"GSA is reluctant however to contract directly with private contractors to perform construction work at the site. A contract awarded by GSA to a contractor other than the Turner Construction Company would present problems which often result in claims for delays and increased costs due to decreased efficiency in construction work caused by improper coordination of work areas, changes in sequence of work and changes to the work schedule. Such claims could be asserted against both the Corporation and the Government. Also, it is not considered desirable for GSA to contract directly with Turner. Because of Federal Procurement Regulations, the general provisions of both contracts would differ. It would be difficult to separate clearly the work by contract description and to determine with precision which contract work a contract employee was performing at any given time. Under such circumstances, difficulties would arise with respect to pricing and determining which contract should be charged for work resulting from change orders which inevitably arise in construction work.

"In view of the above, GSA proposes to transfer all or a major portion of the \$2 million directly to the Corporation to be applied directly toward construction costs. The

agreement to transfer the funds will contain appropriate safeguards to ensure that the funds will be strictly applied to the purposes of the gift and will include any other terms and conditions deemed necessary to protect the interests of the United States. Consideration will also be given for direct Federal contracting of minor items of work provided that the problems of dual contracting at the site can be avoided.

"We believe that the expenditure of the funds in the manner described above is not inconsistent with the intent of the appropriations Act. With respect to the gift of land by the Commonwealth and the offer of a future gift of \$2 million toward construction, it is clear that the intention of the Commonwealth was to make a donation to be added to the many private donations received by the Corporation for the construction of the facility. If the \$2 million gift from the Commonwealth had been offered to and received by the Corporation, rather than the United States, such funds undoubtedly would have been co-mingled with the private gifts and would have lost their identity as separate funds. We understand that the gifts were proffered directly to the United States, rather than the Corporation, since Article XVIII of the Amendments to the Constitution of the Commonwealth prohibits, with minor exceptions not material here, gifts to institutions which are not publicly owned and under the exclusive control and supervision of public officers."

We note that on both occasions where the Congress enacted legislation waiving the 60-day waiting period before acceptance of the offered donation, (Pub. L. No. 89-547 and Pub. L. No. 95-34, supra) it was understood and contemplated by the Congress that the Corporation was to construct the Library on the site after its conveyance to the United States and, thereafter, upon its completion, the Library would be conveyed to the United States.

The reason that the site was being transferred to the United States before the Library was completed, rather than after its construction as is the normal procedure, was explained during the hearings on H. R. 12339, 94th Cong., 2d Sess., the identical House version of S. 3399 (now Pub. L. No. 94-300), as follows:

"MR. PREYER. Thank you, Mr. Griffin and Madam Chairwoman.

"I understand that one reason the U.S. Government got this in the first place was because of the effect of the

antigift statute of Massachusetts. It might be useful for the record if you could briefly explain the effect of that antigift statute.

"MR. GRIFFIN. I can explain it and perhaps Mr. Mulligan can explain it further.

"My understanding of the law is that it does not permit the State of Massachusetts to donate or make gifts, to private citizens or private corporations. In this instance the Kennedy Library Corp. obviously is a private corporation, so the gift had to be made to the U.S. Government, in this instance, so they would not be in violation of that statute.

"That is generally the reason. This is the first time in the history of a Presidential library, and we operate five others, where the U.S. Government was asked to take title to the land prior to both the library and the land being offered at the same time. Therefore, we are into this particular library much earlier than we normally would be.

"MR. PREYER. In one sense the United States was sort of a straw man holding technical title to this land because of that statute.

"MR. MULLIGAN. Not exactly, sir, because upon completion of the library it was anticipated that the Government would take control of the physical facilities there and operate a Presidential library there. There was no anticipation there would be a break in title from the time we accepted title.

"MR. PREYER. I appreciate your statement. It does seem to me that this is an equitable thing to do and that the United States would be acting generously, as it should act, in this case."

Hearings before a Subcommittee on the House Government Operations Committee on H.R. 12339 and H.R. 11347, 94th Cong., 2d Sess., pp. 9-10 (1976).

Both laws authorized the Administrator to accept land, buildings or equipment to maintain or operate the Library without regard to the 60-day waiting period, but said nothing about constructing the

Library. This is consistent with 44 U.S.C. § 2108(a) which only authorizes the Administrator of General Services to maintain and protect land, building and equipment donated to create a Presidential archival depository, but not to construct it. However, authority to accept gifts or bequests of money for maintaining, operating, protecting, and improving a Presidential archival depository is provided by 44 U.S.C. § 2108(g). This provision suggests that the Administrator would be authorized to accept money for direct construction of improvements to a Presidential archival depository in accordance with the terms and conditions imposed upon such gift by the donor. In this regard, see 44 U.S.C. §§ 2301-2308 establishing and providing for the operation of the National Archives Trust Fund (NATF) by the NATF Board, and 31 U.S.C. § 725s making such funds available for expenditure (in accordance with the terms of the Trust).

However, Pub. L. No. 95-429, inter alia, directed that if and when the \$2 million was donated by the Commonwealth, it would be deposited into the Federal Building Fund rather than into the NATF.

Thus it is clear from the foregoing that the Congress intended:

- (1) to accept title to the land for a site for the library;
- (2) that the Corporation would construct the library on the site, following acceptance by the United States; and,
- (3) that acceptance of the site prior to construction was merely an accommodation by the United States in order to permit its donation for that purpose by the Commonwealth.

At the time of the offer of the Columbia Point site for the Library by the Commonwealth, the Congress was aware of the \$2 million offered conditionally to finance improvements to the Library site and approaches thereto. Congress was also aware that construction by the Corporation had not yet begun and could not begin until the United States accepted the donation of the site. Furthermore, it is reasonable to assume that the Congress understood that the reason the Commonwealth was making a conditional offer of \$2 million for improvements to the United States rather than to the Corporation--even though all parties involved understood that the construction was to take place under the direction and authority of the Corporation--was in order to overcome the same impediment in Massachusetts law on donations by the Commonwealth to a private corporation which necessitated the donation of the site itself to the United States prior to completion of the Library. (See excerpt from subcommittee

hearings on H.R. 12339 and H.R. 11347, quoted *supra*.) Thus we might reasonably conclude that it was intended ~~that~~ the \$2 million be available to the Corporation for the construction of the Library.

Apparently this was the view expressed by Mr. Stephen E. Smith, President of the Corporation in his letter of March 16, 1977, to the Honorable Robert Griffin, Acting Administrator of GSA which was transmitted by the Administration as part of his report (as required by 44 U.S.C. § 2108(a)) to the Congress for prior consideration, wherein he states concerning the conditional gift of \$2 million by the Commonwealth that:

"Upon acceptance by the United States of KLC's foregoing offer, it is understood that the United States will thereafter maintain, operate and protect the Library as aforesaid, and that whenever the United States may receive from the Commonwealth its proposed donation of \$2,000,000 (or any other amount) for the purpose of financing improvements on the site for the Library and approaches thereto, the United States, in the discretion of the Administrator of the General Services Administration, will apply such amount (either directly or indirectly as by reimbursement of expenses of KLC) for such purpose."

See the report of the House Committee on Government Operations accompanying H. J. Res. 424 (Pub. L. No. 95-34) H.R. Rep. No. 95-273, 95th Cong., 1st Sess., p. 23 (1977).

At the time the Congress appropriated the \$2 million "to be applied for the purpose of the gift" the Corporation had already contracted with the Turner Construction Company, and construction had already begun. Although Mr. Smith's letter, quoted above, appears to acknowledge the authority of the Administrator, GSA, to use the \$2 million for construction "directly or indirectly", the House report on the bill that became Pub. L. No. 95-34, supra discussed only indirect intervention by GSA in the construction process. The principal concern appeared to be compliance by the corporation's contractor with GSA standards for energy conservation and access for physically handicapped persons, among others. The report notes with approval that GSA appears to have made adequate arrangements for coordination during development and operation with both the Corporation and the University of Massachusetts. H. R. Rep. No. 95-273, p. 5-6 (1977).

We conclude that it is legally permissible for GSA to make the additional site improvements directly or through a transfer of the funds to the Corporation for the same purpose. The GSA has

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presented several cogent arguments relating to contract conflicts were it to attempt to deal directly with the Corporation's contractor to perform additional work or award a contract to another firm to to construct improvements on the same site. Many of these problems arise from possible differences in Federal procurement regulations and State contract regulations. We therefore have no objection to the administrative decision to transfer all or the major portion of the \$2 million appropriation to the Corporation provided that GSA insists on adequate safeguards to protect the interests of the United States and to assure that the funds will be applied only for the purposes contemplated.

(SIGNED) ELMER B. STAATS
Comptroller General
of the United States

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